Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 80-116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ANGELO DARRIGO,

Appellant,

v.

STATE COMMISSION ON JUDICIAL CONDUCT, the HON. MRS. GENE ROBB, CHAIRPERSON, the HON. GERALD STERN, ADMINISTRATOR, and the HON. FRANCIS L. VALENTE, JR., REFEREE, and THE SEVERAL OTHER MEMBERS OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT AS IT CURRENTLY EXISTS PURSUANT TO THE CONSTITUTION OF THE STATE OF NEW YORK, ART. 6, SECT. 22, AND THE JUDICIARY LAW OF THE STATE OF NEW YORK, SECTS. 40-48,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

MOTION TO DISMISS APPEAL OR AFFIRM ORDER APPEALED FROM

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Question Presented

Whether the appellant's claims with respect to the provisions of the New York State Constitution and Judiciary Law prescribing the procedures for the investigation, prosecution and adjudication of complaints alleging misconduct of judges, present a substantial federal question meriting review by this Court.

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MOTION TO DISMISS APPEAL OR AFFIRM ORDER APPEALED FROM

Preliminary Statement

The appellees, State Commission on Judicial Conduct, et al. ("Commission") make this motion, pursuant to Rule 16 of this Court, to dismiss the appeal taken by Angelo Darrigo ("appellant") from the order of the Appellate Division, First Department, entered March 20, 1980 (Jur.St.

2a*), unanimously affirming the judgment of the Supreme Court, New York County, entered July 3, 1979 (Jur.St 10a-12a); or, in the alternative, to affirm the order of the Appellate Division, First Department.

Parties

A list of the parties to the proceeding in the Appellate Division, First Department, is contained in the full caption of this case and has been set forth separately in appellant's jurisdictional statement (Jur.St. 2, fn. 1).

Opinions Below

The opinion of the Appellate Division, First Department, dated March 20, 1980, upon which the order appealed from is based, is officially reported at 74 A.D.2d 801 (1st Dep't 1980) but has not yet been reported unofficially. At this writing, none of the other opinions rendered in the courts below have been reported either officially or unofficially. However, the opinion of the Supreme Court, New York County, dated March 24, 1979, upon which its judgment was based, is printed in the New York Law Journal, June 7, 1979, p. 10, col. 3 (Sup.Ct.N.Y.Co.). The opinion of the Appellate Division, First Department, referred to above, unanimously affirming the judgment of the Supreme Court, New York County, is printed in the New York Law Journal, March 24, 1980, p. 7, col. 3 (App. Div. 1st Dep't). The decision of the Court of Appeals, denying appellant's motion for permission to appeal and dismissing his appeal taken as of right for want of a substantial constitutional question, is printed in the New York Law Journal, July 8, 1980, p. 6, col. 2 (Ct. of Appeals).

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* References preceded by the designation "Jur.St." are to pages of appellant's jurisdictional statement.

Jurisdiction

We respectfully submit that this Court lacks jurisdiction to entertain the instant appeal under 28 USC § 1257, because appellant has failed to demonstrate that the order appealed from was necessarily based upon a federal ground. *E.g., Stembridge* v. *Georgia,* 343 U.S. 541 (1952). Thus, the unanimous affirmance by the Appellate Division, First Department, of the judgment of the Supreme Court, New York County, dismissing appellant's Article 78 petition, may have reflected a determination by the First Department that the federal constitutional claims asserted by appellant against the Commission on that appeal were inappropriately or prematurely raised, in view of appellant's right under New York Constitution Article 6, § 22(a) to ultimate review of any final Commission decision in his pending disciplinary case by the New York Court of Appeals. *E.g. Jerry* v. *Board of Education,* 35 N.Y.2d 534, 544-545, 364 N.Y.S.2d 440 (1974); *YMCA* v. *Pure Waters District,* 37 N.Y.2d 371, 372 N.Y.S.2d 633 (1971). Certainly, the Appellate Division made no explicit ruling on the constitutional issues. Moreover, the Court of Appeals subsequently dismissed the appeal, purportedly taken as of right by appellant on constittuional grounds from the Appellate Division order under CPLR 5601(b)(1), "upon the ground that no substantial constitutional question is directly involved" (Jur.St. 14a). Under these circumstances the order appealed from may well have rested on an adequate nonfederal ground and this appeal should accordingly be dismissed for lack of jurisdiction.

Provisions Involved

The provisions generally relevant to this case include New York State Constitution, Article 6, § 22 (McKinney's vol. 2, Supp. 1979-80) and New York Judiciary Law, Article

2-A, §§ 40-48 (McKinney's vol. 29, Supp. 1979-80). These provisions are reproduced in their entirety in the appendices to appellant's jurisdictional statement (Jur.St. 17a-36a).

Facts

Introduction: The Role of the Commission

The Commission is a judicial disciplinary body with authority, under Article 6, § 22(a) of the New York State Constitution, to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system."

The Commission is the descendant of the Temporary State Commission on Judicial Conduct, which was created in 1974 as a temporary agency with a view to becoming a permanent, constitutional body. The purpose of establishing the Temporary Commission was to provide a means for review of complaints against judges by the public.

The Temporary Commission was succeeded on September 1, 1976, by the former Commission, by virtue of a state constitutional amendment approved by the New York State electorate in November 1975. On April 1, 1978, pursuant to a second amendment to the New York Constitution (approved by the state's electorate in November 1977), the current Commission came into being. The latter amendment re-established an 11-member Commission (composed of four judges, five attorneys and two lay persons), broadened the scope of the Commission's authority and streamlined the procedure for disciplining judges within the state's unified court system.

As empowered by New York Constitution Article 6, § 22 and Judiciary Law §§ 40-48, the present Commission may:

> receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to per-

> form or performance of official duties of any judge or justice in the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties.
>
> N.Y. Const. Art. 6, § 22(a)

The Commission is authorized to receive written, signed complaints from members of the public. Upon receipt of such a complaint, the Commission may conduct an investigation of the complaint or dismiss the complaint (Judiciary Law § 44[1]).

The Commission may also initiate its own investigation of a judge, upon the filing of an "Administrator's Complaint:"

> The Commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the Commission shall file as part of its record a written complaint, signed by the administrator of the Commission ["Administrator's Complaint"], which complaint shall serve as the basis for such investigation.
>
> Judiciary Law § 44(2)

The Commission has power to administer oaths, subpoena witnesses, require the production of any books, records, documents or other evidence, confer immunity and require the appearance of a judge before it to give sworn testimony in an investigation (Judiciary Law §§ 42, 44[3]).

If the Commission finds that a hearing on formal charges is warranted, it may authorize a "Formal Written Complaint" (Judiciary Law §44[4]). Following an Answer by the judge an adversary evidentiary hearing on the Formal Written Complaint is then held. That hearing may be held before a referee designated to hear and report (Judiciary Law §43[2]).

After a hearing, the Commission may dismiss the complaint or may determine that a judge be admonished, censured, removed or retired. If the Commission imposes a sanction on a judge, he has a right to a review of the determination on the law and the facts by the New York Court of Appeals, the highest court of the state court system (New York Constitution Article 6, §§22[a], [d]; Judiciary Law §§44[7], [9]).

The Commission's Investigation of Appellant and the Subsequent Disciplinary Proceeding

Appellant is a lawyer and Town Justice in Newburgh, New York. The possibility that appellant had engaged in judicial misconduct first came to the Commission's attention in early 1977. The Commission staff, while examining public records in a justice court other than appellant's (during an ongoing investigation of alleged misconduct by another judge), discovered the following letter, dated September 8, 1975, written by appellant on his official stationery, addressed to the "Presiding Justice" of that justice court and requesting special consideration or favored treatment on behalf of a defendant whose case was then pending therein:

> Dear Judge:
>
> Enclosed please find summons #E853345 issued to my neighbor, Joseph A. Catania, 37 Meadow Street, Newburgh, New York.
>
> You will note that he has signed the summons on the back wherein he pleads Guilty to the charge.

Please advise what disposition you require and it will be mailed to you forthwith.

However, I would appreciate any consideration that you can give to my neighbor.

Very truly yours,
/s/
Angelo Darrigo
(Rec. 103*)

As a result, the Commission, pursuant to former Judiciary Law §43(2) (now §44[2]), directed Gerald Stern, the Commission's Administrator, to file an Administrator's Complaint, dated April 22, 1977, to serve as the basis for an investigation (Rec. 182, 185, 227-29, 244-46, 281-84). The Adminstrator's Complaint read in pertinent part:

> Judge Darrigo wrote a letter on his official stationery on September 8, 1975, to Judge Walter Gersten of Thompson Town Court. He sought consideration on the disposal of a traffic ticket to a defendant (Joseph Catania) who was his neighbor. The letter was intended to influence Judge Gersten in the disposition of this case on the basis of personal consideration. It was in breach of Sections 33.2(b)(c) and 33.3(a)(4) of the Rules of the Administrative Board of the Judicial Conference of the State of New York.
>
> (Rec. 182)

Further investigation, consisting primarily of examination of public records in appellant's and other courts, revealed a number of other cases in which appellant sought special consideration on behalf of defendants in traffic cases pending before other judges; in which his own dis-

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* References preceded by the designation "Rec." are to pages of the Record on Appeal in the Appellate Division, First Department.

position of traffic cases was influenced by similar *ex parte* requests from third parties; or in which he granted favorable dispositions to clients, former clients or their relatives (Rec. 76-78). Two letters were subsequently sent by Mr. Stern to appellant, enclosing documents relating to these cases and requesting his explanation of his role therein (Rec. 105, 110-11). Appellant answered these letters and volved (Rec. 106-09, 112-15).

On June 12, 1978, the Commission, exercising its authority under Judiciary Law § 44(3), sent a letter to appellant requesting his investigative appearance before a member of the Commission on June 28, 1978, at the Commission's New York City office.* Appellant was asked to give testimony concerning his alleged role in 39 cases including the *Catania* matter (Rec. 116-20).

Appellant failed to appear on June 28, 1978 (Rec. 123-25). Nor did he appear on July 18 or July 27, 1978, pursuant to further requests for his appearance (Rec. 129-31, 82). No written explanation for the failure to attend was ever given by appellant (Rec. 82).

On September 20, 1978, appellant was served with a Formal Written Complaint, pursuant to Judiciary Law § 44(4), formally charging him with failing to appear before the Commission and failing to reply to the Commission's request for a written explanation of his failure to appear (Rec. 135-39). Appellant's Answer was received on October 6, 1978 (Rec. 140-43).

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* Judiciary Law § 44(3) states in pertinent part:

> In the course of an investigation, the Commission may require the appearance of the judge involved before it, in which event the judge shall be notified in writing of his required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In either case a copy of the complaint shall be served upon the judge at the time of such notification.

On November 16, 1978, pursuant to Judiciary Law § 43(2), the Honorable Francis L. Valente, Jr., was appointed as referee for the fact finding hearing (Rec. 220). The hearing took place on December 20, 1978, and February 9, 1979 (Rec. 221-357). No determination has yet been made by the Commission concerning the allegations of the Formal Written Complaint.

The Proceedings in Supreme Court, New York County

By order to show cause, dated February 7, 1979, appellant brought a proceeding in Supreme Court, New York County under Article 78 of the New York Civil Practice Law and Rules, in which he sought, on various state statutory and federal constitutional grounds, an order prohibiting the Commission from "taking any further actions" against him and declaring unconstitutional Judiciary Law §§ 40-48 (Rec. 19-38). Appellant's initial application for an interim stay of the pending disciplinary proceedings was denied (Rec. 20).

By notice of motion, dated February 15, 1979, the Commission moved to dismiss appellant's Article 78 petition (Rec. 72-89). On February 21, 1979, appellant served a "cross-notice of motion" to amend his petition (Rec. 149-80), and on February 23, 1979, he made a new motion for an interim stay of the disciplinary proceedings (Rec. 382-87).

In its decision dated May 24, 1979, the Supreme Court upheld the constitutionality of the Commission's combination of investigative, prosecutorial and adjudicatory functions as well as its statutory procedures for initiating an investigation, filing formal disciplinary charges and referring fact-finding hearings to a referee. The Court also refused to prohibit the disciplinary proceedings pending against appellant under Judiciary Law § 44(4). However, relying on state decisional law interpreting Judiciary Law § 44(2), the Court conditionally prohibited the Com-

mission from examining appellant, in the course of its original, underlying investigation, with respect to any of the 38 named matters that, unlike the *Catania* matter, were not specifically enumerated in the existing Administrator's Complaint; but the Court further held that "should the Commission find, on the basis of information in its files, that additional complaints are warranted, it may, of course, file such a complaint in accordance with the procedures provided in Judiciary Law Sec. 44(2)" (Rec. 17-18).

The Judgment

The judgment of the Supreme Court, entered July 3, 1979, denied appellant's motion to stay the ongoing disciplinary proceedings pending resolution of his lawsuit; dismissed his Article 78 petition insofar as it sought prohibition of those proceedings or a declaration of the unconstitutionality of the Commission's state constitutional and legislative authority; and prohibited the Commission from undertaking any further investigation of appellant as to specific matters for which no Administrator's Complant had yet been filed under Judiciary Law § 44(2) or for which no private complaint had yet been received under Judiciary Law § 44(1), unless and until the Commission received or filed additional complaints covering such matters (Jur.St. 10a-12a).

The Proceedings on Appeal

Appellant appealed to the Appellate Division, First Department, from so much of the judgment as dismissed in part his Article 78 proceeding (Rec. 3). The Commission cross-appealed from so much of the judgment as prohibited it from investigating specific matters pertaining to appellant for which it had received or filed no additional complaint pursuant to Judiciary Law §§ 44(1) or (2) (Rec. 5-6).

The Appellate Division, First Department, in an opinion and order dated March 20, 1980, unanimously affirmed the judgment (Jur.St. 1a-3a).

Appellant subsequently sought to appeal that decision to the New York Court of Appeals, by filing a notice of appeal as of right as to the constitutional grounds asserted and seeking leave to appeal as to the remainder of his claims. His motion in the Appellate Division, First Department, for permission to appeal, was denied by order of that Court, entered April 29, 1980 (Jur.St. 13a). The Court of Appeals denied a similar motion by appellant by order entered July 3, 1980 (Jur.St. 14a). In the same order, the Court of Appeals granted a cross-motion by the Commission to dismiss the appeal previously taken by appellant as of right, on the ground that no substantial constitutional question was directly involved (Jur.St. 14a). Appellant thereupon filed a notice of appeal to this Court dated July 8, 1980 (Jur.St. 15a).

ARGUMENT

I. The Appeal Fails to Present a Substantial Federal Question Meriting Review by this Court

Introduction: The Nature of the Appeal

Appellant seeks a determination of unconstitutionality of various provisions of the New York Constitution and Judiciary Law relating to the power vested in the Commission and the procedures authorized for the conduct of its work. These provisions, he claims, violate his Fourteenth Amendment right to due process of law and other guarantees under the United States Constitution.

In particular, he attacks the Commission, as created, because of its unified structure with respect to investigation, prosecution and determination; the absence of specified, statutory standards for the bringing of formal writ-

ten charges; the absence of specified, statutory standards for the initiation of an investigation; and the provision for designation of a referee to hear and report to the Commission. In effect, the claim is that the people of the State of New York, in creating this particular Commission, with the power and authority vested in it, contravened the United States Constitution. The Courts below uniformly rejected the argument, for, as shown herein, it is patently insubstantial. It is, indeed, unworthy of further scrutiny by this Court, for which reason we respectfully submit that the present appeal should be dismissed in all respects or, in the alternative, that the order of the court below be affirmed.

The Unified Structure of the Commission

Appellant begins his attack with an assault on Article 6, § 22(a) of the New York Constitution which creates the Commission and empowers it to receive, initiate, investigate and hear complaints and determine that a judge be disciplined.

It is that embodiment of investigative, prosecutorial and adjudicative functions in a single agency, as prescribed by the constitutional mandate, which, according to appellant, is inherently violative of due process of law. However, as the discussion in his jurisdictional statement reveals, and as the Courts below recognized, this Court has held exactly the contrary: an authorization of investigative, prosecutorial and determinative functions to be performed by a single administrative agency is not in violation of due process of law. *Withrow* v. *Larkin,* 421 U.S. 35, 47-58 (1975) (medical disciplinary proceeding); *Friedman* v. *State of New York,* 24 N.Y.2d 528, 544, 301 N.Y.S.2d 484 (1969), *app. dism'd,* 397 U.S. 317 (1970) (judicial disciplinary proceeding); *Matter of Del Rio,* 400 Mich. 665, 690, 256 N.W.2d 727 (1977), *app. dism'd,* 434 U.S. 1029 (1978) (judicial disciplinary proceeding). *See also, Halleck* v. *Berliner,* 427 F. Supp. 1225, 1243-4

(D.D.C. 1977) (judicial disciplinary proceeding) and cases cited therein; *Matter of Sarisohn,* 21 N.Y.2d 36, 48, 286 N.Y.S.2d 255 (1967) (judicial disciplinary proceeding). Thus, this Court has consistently ruled that "[t]he mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of [administrative agency] members at a later adversary hearing." *Withrow* v. *Larkin, supra,* 421 U.S., at 55. Accord, *Hortonville J.S.D. No. 1* v. *Hortonville Ed. Ass'n,* 426 U.S. 482, 493 (1976) (teacher disciplinary proceeding); *F.T.C.* v. *Cement Institute,* 333 U.S. 683, 700-703 (1948) (proceeding on price setting). Consequently, before a state agency will be forestalled from pursuing its mandate, the complaining party must support the due process claim with a concrete showing of actual bias on the part of the agency members whose action is being challenged. *Withrow, supra; Hortonville, supra; Halleck, supra.* For, "[w]ithout a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances'" *Withrow, supra,* 421 U.S., at 55. At no time in the course of this litigation has appellant demonstrated or even alleged a scintilla of actual bias on the part of the Commission.

Nor, for that matter, has appellant set forth any compelling reason why this Court should now depart from existing precedent or disregard the comprehensive procedural safeguards, contained in the Commission's legislation, that were manifestly designed to insure against even the possibility of such prejudice. These safeguards include, for example, the right of a judge to have counsel present at an investigative appearance and to receive a free copy of the transcript of that proceeding (Judiciary Law § 44[3]); the right to an adversary evidentiary hearing on disputed facts and to extensive discovery in advance thereof (§ 44[4]); the right, pursuant to Commis-

sion rule, to submit a brief and present oral argument to the Commission itself with respect to a referee's report and the issue of sanction (22 NYCRR § 7000.7[a]); and, if the Commission does determine a sanction, the right, provided by both the State Constitution (Art. 6, §§ 22[a], [d]) and the Judiciary Law (§§ 44[7], [9]) to have that determination reviewed in the Court of Appeals, which must review on the record the Commission's findings of fact and conclusions of law and may make its own determination. *See, Matter of Spector,* 47 N.Y.2d 462, 418 N.Y.S.2d 385 (1979).

It should be noted that this Court has twice in the past considered constitutional challenges to the combination of functions of the former Court on the Judiciary.* Thus, in *Friedman* v. *Court on Judiciary,* 375 U.S. 10 (1963), this Court dismissed an appeal, taken on that and other grounds from a determination of the Court on the Judiciary, for want of a substantial federal question. Similarly, in *Friedman* v. *State of New York,* 24 N.Y.2d 528 (1969), *app. dism'd,* 397 U.S. 317 (1970), this Court dismissed, for the same reason, an appeal from a decision of the New York Court of Appeals which explicitly upheld against due process challenge the combination of functions of the Court on the Judiciary. The Court of Appeals had stated:

> The Court on the Judiciary is a court of record (Judiciary Law, § 2) whose jurisdiction is strictly limited to removing or retiring a Judge or Justice and disqualifying a Judge or Justice removed from again holding any public office in this State (New York Constitution, Art VI, § 22). To this extent the Court on the Judiciary sits to supervise the conduct of the

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* The Court on the Judiciary had state constitutional authority to remove judges for "cause" or to retire them for disability, from 1947 until 1978, when its jurisdiction was abolished pursuant to an amendment to New York Constitution, Article 6, § 22.

> members of the Judiciary of this State, and like an administrative agency which may remove an employee for cause, where a combination of functions is traditional, so too that combination of functions may, consonant with due process, exist in the Court on the Judiciary.
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> *Id.*, at 544

Appellant's argument is thus singularly unpersuasive. Particularly inapposite is his reliance on *Matter of Murchison,* 349 U.S. 133 (1955), which reliance was expressly rejected both by the New York Court of Appeals in *Friedman, supra,* and later by this Court in *Withrow, supra.* The Commission obviously is not a "one-man grand jury" and does not base its disciplinary findings on the non-reviewable impressions of its members gained in isolated inquisitorial settings, but rather on record evidence sifted through the adversary process and subject to further judicial review. Investigation and prosecution of Commission cases are carried out by an Administrator and staff who are forbidden from giving aid or advice to the Commission with respect to the adjudication of any proceedings in which they have been involved in an investigative or prosecutorial capacity. *See,* 22 NYCRR §§ 7000.6(f)(3); 7000.7(b). The hearing itself is normally held before an impartial referee (Judiciary Law § 43[2]). All pleadings, all Commission findings and conclusions, all testimonial, documentary and other evidence which the Commission had before it in making a determination and, of course, the determination itself, are included in the Record for Review by the Court of Appeals, pursuant to rule of that Court. 22 NYCRR § 530.2.

In short, there is no foundation whatsover for any claim that the Commission prejudges facts or that its investigative, prosecutorial and adjudicative functions are so inextricably intertwined as to deny respondent judges their right to a fair hearing. The unified structure of the

Commission, as created by the New York Constitution and as implemented by the statute and rule, is therefore valid and entirely consonant with the constitutional standards of due process of law.*

Procedure for Filing Administrator's Complaint

Appellant claims that "in order to insure an independent Judiciary there should be at least some degree of legally required evidence to be submitted to the Commission" before it files an Administrator's Complaint pursuant to Judiciary Law §44(2) (formerly §43[2]), and that the absence of a specified statutory "standard of proof" renders the provision constitutionally defective (Jur.St. 31-32). This claim should likewise be rejected.

To begin with, appellant adduces no legal authority for the proposition that the filing (or receipt) of a preliminary investigative complaint must be conditioned upon the fulfillment of a prescribed evidentiary prerequisite and, indeed, we are aware of no agency in New York or elsewhere which imposes such a requirement. For example, the Judiciary Relations Committees of the First and Second Judicial Departments, which formerly investigated allegations of misconduct by lower court judges in New York, were simply authorized to "entertain" complaints, or to dismiss them on their face or following a preliminary

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* Appellant makes passing reference to a claim that the presence of lay members on the Commission denies him his Sixth Amendment right to counsel (Jur.St. 25, fn. 7). This assertion is based upon a misreading of *North* v. *Russell*, 427 U.S. 328 (1976), wherein this Court explicitly declined to decide the question "whether a defendant could be convicted and imprisoned after a proceeding in which the only trial afforded is conducted by a lay judge" (*Id.*, at 334)—circumstances obviously inapplicable here in any event. It should be noted that at least one state has explicitly held that the presence of lay members on a judicial disciplinary commission is consistent with due process. *See, McComb* v. *Commission on Judicial Performance*, 138 Cal. Rptr. 459, 464-5, 564 P.2d 1, 11-12 (1977).

investigation, as the Committees saw fit. 22 NYCRR §§ 607.6(b), (c) (First Department); §§ 704.7(a), (b) (Second Department). Similarly, a review of the rules of the various Appellate Divisions governing the conduct of attorneys reveals that while several provide for the receipt or filing of preliminary complaints, none sets burden of proof standards for the initiation of investigations. *See,* 22 NYCRR § 603.4(c) (First Department); § 691.4(c) (Second Department); § 806.4(a) (Third Department); § 1022.19(b) (Fourth Department). *See also, e.g.,* N.Y. Exec. Law § 297(1), (2) (State Division of Human Rights); N.Y. Pub. Health Law § 230.(10)(a) (State Board for Professional Medical Conduct). *And see,* 15 USCA § 78u(a) (Securities and Exchange Commission); 47 USCA § 208 (Federal Communications Commission); 16 CFR § 2.1 (Federal Trade Commission).

In any event, appellant's apparent contention that the Commission may not even initiate an investigation until it has acquired the information which only an investigation can uncover is patently ludicrous. No principle of law, constitutional or otherwise, justifies an absurdity which would make it impossible to conduct investigations and render § 44(2) entirely nugatory. Certainly, the cases relied on by appellant at pp. 31-32 of the jurisdictional statement are of little assistance, inasmuch as they merely reflect traditional judicial restraints on the subpoena power and plainly do not restrict the authority of agencies such as the Commission to take cognizance of and initiate investigations into allegations of misconduct, whether received from private citizens, published in the press or acquired in the course of separate investigations. In fact, the Administrator's Complaint filed in the instant case (Rec. 182) was based on a highly inculpatory letter obtained through inspection of public court records. Under such circumstances, appellant cannot seriously challenge the Commission's right to file an Administrator's Complaint and thereby commence an investigation into the matters.

Procedure for Instituting Formal Charges

Appellant's attack on Judiciary Law § 44(4)—on the ground that the provision lacks an express requirement that there exist "reasonable grounds to believe that judicial misconduct is taking place" or "probable cause," or "any of the other old bromides known to the law" (Jur.St. 43)—is equally without merit. Explicit statutory incorporation of such a standard has not been regarded as essential to due process, which requires only that "the charged party be fully and fairly apprised of the factual nature of the charges being made against it." *Div. of Human Rights* v. *Kilian Mfg. Corp.*, 42 A.D.2d 391, 393, 348 N.Y.S.2d 428 (4th Dep't 1973), *rev'd on other grounds*, 35 N.Y.2d 201, 360 N.Y.S.2d 603 (1974); *app. dism'd*, 420 U.S. 915 (1975); *Matthews* v. *Eldridge*, 424 U.S. 319, 348-9 (1976).

Indeed, it can be argued that such adequate notice will satisfy due process even where the charges when made are unsupported by any underlying proof. Thus, this Court has held in criminal cases that "[a]n indictment . . ., if valid on its face, is enough to call for trial of the charge on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956). *See also, Bracy* v. *United States*, 435 U.S. 1301, 1302 (1978) (Rehnquist, Cir.J.). If so, then surely, such proof need not be expressly required by statute.

Appellant has never disputed that the Formal Written Complaint served on him in this case gave clear and ample notice of the facts alleged. If true, those allegations constituted "cause" for discipline. *E.g., Friedman* v. *State of New York, supra; Sarisohn* v. *Appellate Division*, 265 F. Supp. 455, 458 (E.D.N.Y. 1967); *Matter of Osterman*, 13 N.Y.2d (1), (p)-(q) (Ct. on the Judiciary 1963). No more need be shown.

Authority to Designate a Referee

Appellant argues that New York Constitution Article 6, § 22(c), and Judiciary Law § 43(2), authorizing the Com-

mission to refer adversary evidentiary hearings under Judiciary Law § 44(4) to hear and report, violate due process "because the Referee is the one who observes the demeanor and composure of given witnesses, . . . yet, [his findings] may be disregarded completely [by the Commission]" (Jur.St. 33). That appellant's view has been rejected is evident from his reliance upon the dissents in *Matter of Waltemade,* 37 N.Y.2d (nn) (Ct. on the Judiciary 1975) and *Mildner* v. *Gullotta,* 405 F. Supp. 182 (E.D. N.Y. 1975), *aff'd,* 425 U.S. 901 (1976).

In *Waltemade, supra,* the Court on the Judiciary explicitly rejected the judge's contention that "this Court cannot sit in judgment on this case without having personally heard the evidence presented before the Referee." 37 N.Y. 2d at (oo)-(rr). The Court held it sufficient that "evidence be taken in a fair manner, with respondent having full opportunity to present his evidence and argument in opposition to the charges, and that the court review and consider such evidence before reaching its decision." *Id.,* at (pp).

In *Mildner, supra,* the United States District Court, in an analogous context, went further, stating:

> Nor, in our opinion, is it constitutionally required that the Appellate Division as final arbiter of the facts have personally heard the accused attorneys or other witnesses or have allowed oral argument upon the motions to confirm or disaffirm the referee's reports. The use of masters or referees as advisory triers-of-fact is well-established instrument of busy appellate courts exercising original jurisdiction. The Supreme Court itself utilizes the practice when disputed factual issues appear in original actions. R. Stern & E. Gressman, Supreme Court Practice, Sec. 10-12 at 407-08 (4th ed. 1969). Although oral argument to the Court is allowed on the master's report in such matters, id., this is not ordinarily the case in

disbarment proceedings. *See, In re Capshaw,* 65 S. Ct. 673 (1945), and 67 S. Ct. 1345 (1947); *In re Crow,* 359 U.S. 1007, 1008, 79 S. Ct. 1152, 3 L.Ed.2d 1025 (1959) (Douglas, J., dissenting opn.); Stern & Gressman, *supra,* Sec. 19.5.

405 F. Supp., at 195

This Court affirmed the judgment of the District Court. 425 U.S. 901. As noted, the use of referees to hear and report is hardly an innovation in the law. Utilization by the Commission of such a standard, traditional device designed to facilitate the adjudicative process can, under these circumstances, scarcely be deemed to violate appellant's constitutional rights.

Summary

In sum, the creation of a unified Commission, the procedure for initiating an investigation and a disciplinary proceeding, and the authority to designate a referee are fully consistent with the requirements of federal constitutional law.* Devoid of judicial authority, appellant's claims were rightly rejected by the courts below. His present appeal is plainly without basis and should accordingly be dismissed by this Court.

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* Appellant also contends that the Courts below erred in holding that the Commission could proceed with its underlying investigation if it filed a new Administrator's Complaint, pursuant to Judiciary Law § 44(2), based upon information in its files, and asks this Court to "formulate an exclusionary rule which would prohibit the Commission from using the fruits of an illegal investigation as the basis for filing new [investigative] complaints or formal written charges . . ." (Jur.St. 33-34). Appellant has made no showing whatsoever, and the record nowhere suggests, that any information regarding him was obtained by the Commission in violation of the Constitution or laws of the United States. Moreover, no hearing is even contemplated from which such information might be "excluded" in the future. His argument is entirely without basis and should be dismissed as frivolous.

Conclusion

The appeal should be dismissed in all respects. In the alternative, the order of the Appellate Division, First Department, entered March 20, 1980, from which the appeal is taken, should be affirmed. To the extent that this appeal may be treated as a petition for a writ of certiorari, the petition should be denied in all respects.

Respectfully submitted,

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